

**BEFORE THE UNITED STATES
JUDICIAL PANEL ON MULTI-DISTRICT LITIGATION**

In re:

FACEBOOK, INC., CONSUMER PRIVACY
USER PROFILE LITIGATION

MDL Docket No. 2843

**REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION
FOR TRANSFER OF ACTIONS TO THE NORTHERN DISTRICT
OF CALIFORNIA AND FOR CONSOLIDATION PURSUANT TO 28 U.S.C. § 1407**

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U.S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

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I. INTRODUCTION

Pursuant to JPML Rule 6.1(d), Theresa Beiner and Brandon Haubert, plaintiffs in the action *Beiner et al. v. Facebook, Inc. et al.*, Case No. 3:18-cv-1953 (N.D. Cal.), respectfully submit this reply memorandum in support of their motion for transfer of actions to the U.S. District Court for the Northern District of California and for consolidation pursuant to 28 U.S.C. § 1407.

On March 30, 2018, the *Beiner* plaintiffs moved this Panel for an order transferring eight identified actions, as well as any tag-along cases, to the U.S. District Court for the Northern District of California for coordinated or consolidated proceedings. Since that initial filing, a combined 24 cases have been identified as tag-along actions before the JPML, with 16 of those cases having been filed in the Northern District of California.

As was the case when the *Beiner* plaintiffs moved to transfer, more cases have been filed in the Northern District of California than in any other district by a significant margin. That district remains the superior forum for this proposed multidistrict litigation (MDL) because it is where the primary and only common party in all actions, Facebook, has its headquarters, and accordingly where many of Facebook's witnesses and documents are located. The Northern District of California is the most convenient forum, and it can effectively handle the MDL. Moreover, based on the responses filed to date, the overwhelming majority of plaintiffs and the defendants that have appeared before the JPML: Facebook, Cambridge Analytica LLC, Cambridge Analytica Holdings LLC, Cambridge Analytica Political LLC, Cambridge Analytical Commercial LLC, Cambridge Analytica (UK) Ltd. (collectively, "Cambridge Analytica"), and Defendants SCL Elections Ltd., SCL Group Limited, and SCL USA Inc. (collectively, the "SCL Defendants") all support transfer to the Northern District of California.

II. SUMMARY OF RESPONSES

As of this filing, the parties in underlying actions have filed a total of 17 responses and one supplemental response to the *Beiner* plaintiffs' motion to transfer. All parties are in agreement that the consumer class action cases should be centralized for pretrial proceedings; the only issues in dispute are (1) whether derivative actions arising from the same factual allegations should be consolidated or coordinated with the consumer class actions; and (2) where the cases should be transferred.

The vast majority of parties agree that the Northern District of California is the appropriate transferee forum. Eleven responses support transfer to the Northern District of California (see Dkts. 7, 19, 64, 65, 69, 71, 72, 73, 75, 79, 80); Two other responses support transfer to the Central District of California or the Northern District of California as alternatives (see Dkt. 62, 78); One response supports transfer to the Eastern District of Pennsylvania, the District of Delaware, or the District of DC (see Dkt. 57); One response supports transfer to the District of New Jersey or the Eastern District of Pennsylvania (see Dkt. 67); one supports transfer to the Northern District of Illinois (see Dkt. 77); and one supports transfer to the Southern District of Texas (see Dkt. 16).

The Northern District of California is where Facebook's headquarters and many of the potentially relevant witnesses and documents are located. It also has docket conditions conducive to effective handling of this proposed MDL, along with jurists who have substantial experience overseeing similar, large-scale technology and privacy litigation. The shareholder derivative actions should also be consolidated or coordinated in this MDL and transferred to the Northern District of California because the cases concern substantially the same parties and factual core, and coordinating the litigations, particularly for pre-trial discovery, would maximize efficiency for all parties and serve judicial economy.

III. ARGUMENT

A. The Northern District of California is where Facebook's headquarters and many of the potentially relevant witnesses and documents are located.

As demonstrated in the *Beiner* plaintiffs' motion to transfer, Facebook's response, Cambridge Analytica's response, and the responses of 15 groups of plaintiffs, the arguments in favor of transfer to the Northern District of California are compelling. Among other things, the Northern District of California is:

- The home to the headquarters of Facebook, the primary and only common defendant in these cases;
- The location of the majority of witnesses and documents likely to be relevant in these cases;
- The district in which the majority of cases have been filed to date;
- The district home to three international airports;
- A major metropolitan area with public transportation and numerous hotels in close proximity to the courthouses; and
- A forum that the Panel has recognized as well-equipped to handle multi-district litigation, including for large scale privacy and technology cases.

Furthermore, the cases filed in the Northern District of California have already been related, or are pending an order on motions and judicial referrals to relate the cases with the first-filed case in that district.¹ The Panel's prior decisions have made clear that the home district of the primary defendant is the appropriate transferee forum because it has the strongest connection to the litigation and it is where relevant documents and witnesses are likely to be located. *See* Dkt. 1 at 7-8. (collecting cases). As explained further below, the Northern District of California is the center of gravity in this litigation. In this reply brief, the *Beiner* plaintiffs will seek to avoid

¹ The cases that the Court has already held are related are *Beiner et al. v. Facebook, Inc. et al.*, No. 18-01953; *Kooser et al v. Facebook, Inc. et al.*, No. 18-02009; *O'Kelly v. Facebook, Inc. et al.*, No. 18 -01915; *Price v. Facebook, Inc. et al.*, No. 18-01732; *Rubin v. Facebook, Inc.*, Case No. 18-01852; *Haslinger v. Facebook, Inc. et al.*, No. 18-01984; and *Gennock et al. v. Facebook, Inc. et al.*, No. 18-CV-01891.

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duplicative arguments and respond to several of the primary arguments made in the responses in opposition.

B. The home district of Facebook is the center of gravity for this litigation.

The actions underlying this proposed MDL involve allegations relating to the massive unauthorized exfiltration of Facebook user data for use by Cambridge Analytica for “psychometric” targeted advertising during the 2016 presidential election campaign. Facebook’s practices regarding the user data with which it was entrusted are at the center of this litigation, and the Northern District of California, where Facebook has its headquarters and where 16 of 24 actions before the Panel were filed, is the center of gravity. The majority of plaintiffs, Facebook, and the defendants with ties to the United Kingdom support transfer to the Northern District of California. *See* Dkt. 19, 73-74. The decisions, omissions and policies relevant to this litigation were instituted from Facebook’s Menlo Park Headquarters, all reinforcing that the Northern District of California is where the majority of discovery will occur.

The plaintiffs in eleven actions have expressed unequivocal support for transfer to the Northern District of California. Six filings suggest other venues, two as alternatives to the Northern District of California (Dkt. 16, 57, 62, 67, 77, 78). Of those, three—responses favoring the District of Delaware, DC, and Eastern District of Pennsylvania², the Northern District of Illinois, and the Southern District of Texas—emphasize that those locations are roughly midway between the West Coast (Facebook’s headquarters) and the East Coast (Cambridge Analytica’s United States offices), suggesting that a mid-point would be most convenient for the parties. Dkt. 16-1, 18, 77³. However, because the proffered courthouses are hundreds to thousands of

² No actions have been filed in the District of the District of Columbia or the Eastern District of Pennsylvania.

³ The response for the Northern District of Illinois takes this argument one step further, to
Footnote continued on next page

miles from the headquarters of *any* defendant, transferring this action to those districts would simply make the litigation inconvenient for all of them, as well as for the majority of plaintiffs who have already identified the Northern District of California as their chosen forum.

The sole response filed for the District of New Jersey points to Cambridge Analytica's offices in nearby New York City, but ignores that the relevant decisions by Cambridge Analytica likely happened at its headquarters in the United Kingdom. The location of Cambridge Analytica's actual headquarters outside of the United States is a neutral factor that neither favors nor disfavors transfer to any district, although that factor being neutral does underscore the reasonableness of transfer to the district where Facebook's headquarters are located. Notably, Cambridge Analytica is not a named defendant in several of the consumer class actions currently before the Panel. *See* Dkt. 25-3, 25-4, 49-5.

One response—favoring the Central District of California, argues that Facebook witnesses and documents are “just a short trip” away from Los Angeles courthouses (Dkt. 62), but fails to acknowledge the nearly 400-mile distance from Menlo Park to Los Angeles, or to justify the added time and expenses associated with traversing it. Similarly, the response supporting transfer to the District of Delaware asserts that Delaware is the “common geographic focal point” of all of the actions, although there is no reason to believe that any defendant's key personnel or other witnesses and documents will be located in Delaware, which is “common” to certain defendants solely by virtue of their incorporation in that state. Dkt. 57.

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speculate that if additional app developers are named as defendants, it is plausible they will be located throughout the United States, causing Chicago's location in the center of the United States to become even more convenient than the district where Facebook (the only defendant named in every action filed to date), is actually located. Dkt. 77 at 4. Potential proximity to theoretical future defendants has never been identified as a factor in this Panel's analysis, and, even if it were, there is no reason to believe that app developers are more likely to reside nearer to Chicago than to Silicon Valley.

Instead, the center of gravity of this litigation is plainly the Northern District of California, where Facebook's practices were decided and where a significant number of relevant documents and witnesses are actually located—not 400 miles to the south or halfway across the country. *See, e.g., In re Dealer Mgmt. Sys. Antitrust Litig.*, MDL No. 2817, 2018 WL 671499, at *2 (J.P.M.L. Feb. 1, 2018) (“CDK is headquartered in the district, and relevant documents and witnesses thus will be found there.”)

C. The Northern District of California is well-equipped to oversee this action.

Courts in the Northern District of California have unparalleled experience overseeing complex privacy and technology litigation, including litigation against Facebook (Dkt. 1 at 7, collecting cases), and this Panel routinely transfers data security and privacy cases to that district when the primary defendant's headquarters are located there. *See, e.g., In re Apple Inc. Device Performance Litig.*, MDL No. 2827, 2018 WL 1631119, at *2 (J.P.M.L. Apr. 4, 2018) (“The Northern District of California is an appropriate transferee district . . . [given] strong connection to these cases. Apple is headquartered within, and the critical events and decisions underlying plaintiffs' claims occurred in, the Northern District of California.”); *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, 223 F. Supp. 3d 1353, 1354-55 (J.P.M.L. 2016) (“We conclude that the Northern District of California is an appropriate transferee district for this litigation. Defendant Yahoo's corporate headquarters is located within the district, and therefore relevant documents and witnesses are likely to be located there.”); *In re: Carrier IQ, Inc. Consumer Privacy Litig.*, 856 F. Supp. 2d 1332, 1333 (J.P.M.L. 2012) (selecting Northern District of California where “where common defendant Carrier IQ and other manufacturer defendants are headquartered”); *In re: Facebook Internet Tracking Litig.*, 844 F. Supp. 2d 1374, 1375 (J.P.M.L. 2012) (“Common defendant Facebook is headquartered in the Northern District of California, where relevant documents and witnesses are located”); *In re: Google Inc. St. View Elec. Commc'ns Litig.*, 733

F. Supp. 2d 1381, 1382 (J.P.M.L. 2010) (“We are persuaded that the Northern District of California is an appropriate transferee forum for this litigation. The sole defendant, Google, is headquartered there, and most relevant documents and witnesses are likely located there.”). In light of their significant experience overseeing such litigation, Northern District of California courts are particularly well-qualified to handle these types of cases.

Several responses suggest that this MDL should be sent to a less convenient venue because too many MDLs (21) are already pending in the Northern District of California. Responses favoring each of the Central District of California (Dkt. 62), the Northern District of Illinois (Dkt. 77), and the Newark vicinage of the District of New Jersey⁴ (Dkt. 67), state that those forums are superior to the Northern District of California because ten MDLs are pending in each of them. In the District of Delaware, there is only one. Dkt. 57. The number of pending MDLs, however, is not a reliable measure for a forum’s capacity to oversee this litigation. The number of judges in each district varies significantly, as does the criminal and other civil case load and the length and complexity of cases.

MDLs themselves can vary dramatically in size and complexity; some involve fewer than five related litigations, others involve hundreds to thousands of individual claims. Evaluating the number of individual actions coordinated and transferred within MDLs assigned to a particular district, while not always a direct indicator of complexity, nonetheless provides another useful indicator of a district’s MDL case load. From that perspective, the statistics suggest that the Northern District of California is a relatively under-utilized forum:

⁴ The Newark vicinage is only one of multiple vicinages in the District of New Jersey. Seventeen MDLs are pending in that district, not ten.

District	Pending MDL Dockets	Individual Actions Transferred Within All Pending MDL Dockets
Northern District of California	21	3,177
Northern District of Illinois	10	6,780
District of New Jersey	17	13,108 ⁵

Additionally, while fewer MDLs and MDL actions are pending in the District of Delaware and the Central District of California compared to the Northern District of California, there is no meaningful difference in capacity to handle this litigation. The reported total number of pending cases per Article III judgeship⁶ are similar: 608 (N.D. Cal.); 580 (C.D. Cal.); 520 (D.DE), and judges in the Southern District of Texas and the District of New Jersey appear to be exceptionally busy, with a 719 and 982 total pending cases per judgeship, respectively.⁷ Further illustrating that other venues have no particular advantage from the standpoint of “congestion,” the percentage of civil cases that have been pending longer than three years is very close in the California District courts (5.8 percent in N.D. Cal and 5.7 percent in C.D.), 10 percent in the District of Delaware, and 12.8% in the Northern District of Illinois. *Id.*

Most importantly, the Northern District of California is the geographic center of this litigation and possesses experienced and capable jurists who can expediently manage the issues raised by these actions. As all of the defendants and the majority of plaintiffs agree, it is the

⁵ See Dkt. 77-1. This figure excludes actions in five MDLs identified by the Malskoff plaintiffs (Dkt. 67) as part of MDLs in the Newark vicinage that have been “closed.”

⁶ These figures understate the capacity of the Northern District of California, where six Senior District Judges not accounted for by these statistics also handle cases, including seven of the Northern District of California’s pending MDLs. See <https://www.cand.uscourts.gov/judges>.

⁷ U.S.—Nat’l Judicial Caseload Profile, U.S. Courts, *available at* http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distcomparison1231.2017.pdf.

district best-equipped and most convenient for this litigation.

D. The Derivative Cases Should be Centralized in this MDL.

Facebook's Supplemental Response to the *Beiner* plaintiffs' motion (Dkt. 74) argues against including the shareholder derivative action *Karon v. Zuckerberg*, No. 18-01929 (N.D. Cal.), and subsequently noticed derivative actions, in this MDL. *See* Dkt. 55. *Karon* was noticed on April 17, 2018 (*id.*), eighteen days after the *Beiner* plaintiffs' motion was submitted, and thus was not identified as subject to the motion. Dkt. 1-2. The *Beiner* plaintiffs believe, however, that consolidating or coordinating *Karon* and subsequently noticed shareholder derivative actions would promote the efficient conduct of this litigation. All the actions, whether brought by consumers or as derivative action, arise from a common factual core. Therefore, they will share common discovery, even if certain claims or parties are not identically situated. For example, in both litigations, Facebook's data-handling policies and practices, as well as the development and implementation of such policies, will be central inquiries. *See In re Equifax, Inc.*, 289 F. Supp. 3d 1322 (J.P.M.L. 2017) (citation omitted) ("Section 1407 'does not require a complete identity of common factual issues or parties as a prerequisite to transfer, and the presence of ... differing legal theories is not significant where, as here, the actions still arise from a common factual core.'")

Facebook argues that *Karon* and other derivative actions should proceed independently because the plaintiffs and defendants are "different" in those cases from the consumer class actions. Dkt. 74. Like the factual core of each litigation, however, the key *parties* are the same. Indeed, class actions naming a certain defendant are routinely centralized with derivative actions nominally brought on behalf of that defendant, for good reason: coordination before a single judge makes both litigations more efficient. *See, e.g., In re Fed. Nat. Mortg. Ass'n Sec. Derivative & "ERISA" Litig.*, 370 F. Supp. 2d 1359, 1361 (J.P.M.L. 2005) (centralizing

securities class actions, derivative class actions, and class action on behalf of retirement savings plan participants where “all actions can be expected to focus on a significant number of common events, defendants, and/or witnesses”); *In re General Motors Corp. Sec. & Derivative Litig.*, 429 F. Supp. 2d 1368, 1370 (J.P.M.L. 2006) (centralizing securities and derivative actions, same); *In re Fleming Companies Inc. Sec. & Derivative Litig.*, 269 F. Supp. 2d 1374, 1375 (J.P.M.L. 2003) (same); *In re: Zimmer Holdings, Inc., Sec., Derivative & Employee Ret. Income Sec. Act (ERISA) Litig.*, 626 F. Supp. 2d 1319, 1320 (J.P.M.L. 2009) (same); *see also In re: Swisher Hygiene, Inc., Sec. & Derivative Litig.*, 885 F. Supp. 2d 1380, 1381 n.2 (J.P.M.L. 2012) (same, noting that Panel “typically include[s] securities and derivative actions in a single MDL”).

Indeed, even within the limited universe of motions before this Panel that involve Facebook, derivative actions have been centralized with other litigation (in this case, claims against different defendants alleging harm related to the damages at issue in the securities actions) where judicial economy would be served. *See e.g., In re: Facebook, Inc., IPO Sec. & Derivative Litig.*, 899 F. Supp. 2d 1374, 1376 (J.P.M.L. 2012) (“We conclude that though the NASDAQ actions involve different defendants and claims from those in the securities and derivative actions, they do involve enough common questions of fact, related circumstances and common discovery to warrant centralization.”)

Here too, because the derivative actions and the consumer class actions arise from the same policies, omissions, and conduct by Facebook, Cambridge Analytica, and other parties, the cases should proceed within a single MDL. The cases that Facebook relies upon are distinguishable. *In re: Gaiam, Inc., Water Bottle Mktg., Sales Practices & Prod. Liab. Litig.* concerned a motion to consolidate recently-filed cases with an MDL that had already been pending for more than one year, where all of the parties before the Panel and the defendants

opposed inclusion, *and* the newer cases asserted different legal theories and claims. In those circumstances consolidation was unlikely to result in increased efficiency or serve the purposes of Section 1404. 672 F. Supp. 2d 1373, 1375 (J.P.M.L. 2010). Similarly, in *Hodges v. Akeena Solar, Inc.* the District Court denied a motion to relate a derivative suit to a pending securities class action where the pending case was “further along procedurally . . . [having] already survived a Motion to Dismiss and [was] moving toward class certification” because relating cases at different procedural stages of litigation would not reduce the risk of duplication. No. 09-02147, 2010 WL 2756536, at *1 (N.D. Cal. July 9, 2010). Here by contrast, all of the cases are relatively nascent and there are substantial efficiencies to be gained through coordination.

Coordination will also be practical. To the extent there are differences across the litigations, a wide array of pre-trial techniques are available to the transferee court, such as separate motions tracks, to efficiently manage the litigation. *See In re: Home Depot, Inc. Customer Data Sec. Breach Litig.*, 65 F. Supp. 3d 1398, 1400 (J.P.M.L. 2014).

IV. CONCLUSION

For the foregoing reasons, the *Beiner* plaintiffs respectfully request that this Panel grant their Motion for Transfer and Consolidation under Section 1407 and transfer all related actions to the United States District Court for the Northern District of California.

Dated: April 27, 2018

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In re:

FACEBOOK, INC., CONSUMER
PRIVACY USER PROFILE LITIGATION

MDL Docket No. 2843

PROOF OF SERVICE

In compliance with Rule 4.1(a) of the Rules of Procedure for the United States Judicial Panel on Multidistrict Litigation, I hereby certify that on April 27, 2018, I caused a true and correct copy the Reply Memorandum in Support of Plaintiffs' Motion for Transfer o Actions to the Northern District of California and for Consolidation Pursuant to 28 U.S.C. § 1407 (filed by Plaintiffs Theresa Beiner and Brandon Haubert) to be filed with the Clerk of the Court using the Judicial Panel on Multidistrict Litigation's CM/ECF system, which will serve notification of such filing to the email of all counsel who have appeared in this action. I further certify that copies of the foregoing were served on all counsel (or unrepresented parties), and on the Clerk of the Court for each proposed transferor court, by U.S. First Class Mail, postage pre-paid, as shown on the enclosed service list.

Dated: April 27, 2018

Respectfully submitted,

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